METRO MOBILE CTS OF FAIRFIELD COUNTY, INC. et al.
v.
Connecticut DEPARTMENT OF PUBLIC UTILITY CONTROL.

Nos. CV950051275S, CV950550096S.

Superior Court of Connecticut.

Dec. 11, 1996.

MEMORANDUM OF DECISION

LEVINE

*1 The two captioned matters are appeals from decisions of the Department of Utility Control ("DPUC"). Because they have the same parties and turn on the same issues, they have been consolidated for argument and decision, and this decision applies to both.

Each of the six plaintiff-appellants (one of whom was joined as a plaintiff- appellant after the filing of these appeals) is a cellular mobile telecommunications provider ("cellular provider") which is licensed to provide cellular telephone services by the Federal Communications Commission ("FCC") (the plaintiff-appellants are hereinafter referred to, collectively, as "Metro Mobile"). Pursuant to the Omnibus Budget Reconciliation Act of 1993, Pub.L. 103-66 § 6002, 107 Stat. 394 (1993) (the "Budget Act"), Congress has preempted the DPUC from exercising licensing or rate-making authority relative to the provision of cellular telephone services by cellular providers. The DPUC has not challenged the authority of Congress, under the supremacy clause of the United States Constitution (Article VI), to preempt those aspects of state regulation of cellular telephone service. In 1994, the General Assembly adopted P.A. 94-83 which, in its amendments to § 16-247e, C.G.S.:

1) Permits the DPUC, if necessary, to "establish a universal service program, funded by all telecommunications companies or users in the state on an equitable basis, as determined by the department, to ensure the universal availability of affordable, high quality basic telecommunication services to all residents and businesses throughout the state regardless of location" (the "Universal Service Program"); and,

2) Requires the DPUC to "establish a lifeline program funded by all telecommunications companies on an equitable basis, as determined by the department, sufficient to provide low-income households or individuals with a level of communications service or package of telecommunications services that supports participation in the economy and society of the state" (the "Lifeline Program").

Pursuant to the authority granted to it by P.A. 94-83 to establish a Universal Service Program, the DPUC, by its March 31, 1995 decision in its Docket No. 94-07-08 (the "Universal Decision"), determined that cellular providers will be required to make payments toward the funding of a Universal Service Program. Also pursuant to the authority granted to it in P.A. 94-83, the DPUC, by its May 3, 1994 decision in its Docket No. 94-07-09 (the "Lifeline Decision"), determined that cellular providers will be required to make payments toward the funding of a Lifeline Program. It is from those decisions that Metro Mobile has appealed.

P.A. 94-83 was adopted against the backdrop of the Budget Act, which provides, in relevant part:

> [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements ... to insure the universal availability of telecommunications service at affordable rates.

47 U.S.C. § 332(c)(3)(A) (the "Preemption Clause").

*2 Subsequent to the taking of these appeals, Congress adopted, and the President signed, the Telecommunications Act of 1996, Pub.L. 104-104, 110 Stat. 56 (the "1996 Act"), which provides, in relevant part:

> Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State.

The 1996 Act, § 254(f) (to be codified at 47 U.S.C. § 254(f)).

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The 1996 Act goes on to provide: "A State may adopt regulations not inconsistent with the (Federal Communications) Commission's rules to preserve and advance universal service ..." 1996 Act, § 254(f). The FCC has not yet adopted such rules, and therefore Connecticut has not yet adopted any such regulations.

It is found that Metro Mobile is aggrieved by each of the appealed decisions because of the financial impact each would have on it, if implemented, and it is held that Metro Mobile has standing to maintain these appeals.

ISSUES PRESENTED

These appeals present the following issues:

1) Does the Budget Act preempt Connecticut from assessing Metro Mobile for Universal Service and Lifeline Programs?

2) Are the authorities granted to the DPUC by P.A. 94-83 to assess telecommunications companies for Universal Service and Lifeline Programs on an "equitable basis" delegations of legislative authority which violate Article Second (separation of powers provision) of The Connecticut Constitution?

3) Are the assessing authorities granted to the DPUC by P.A. 94-83 unconstitutionally vague in violation of due process requirements? and,

4) What effect, if any, does the 1996 Act have on the decisions appealed from?

PREEMPTION

The DPUC acknowledges that the Budget Act preempts it from licensing, and from regulating the rates of, cellular providers. However, the DPUC contends that its assessments on cellular providers for the Universal Service and Lifeline Programs have been exempted from preemption by the following portion of the Preemption Clause: "... except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." Thus the preemption issue turns on whether assessments on cellular providers for Universal Service and Lifeline Programs are "other forms and conditions of commercial mobile services."

In support of its argument that these assessments are "other terms and conditions" of service, the DPUC cites the legislative history of the Budget Act, in particular the House Report, which states:

> It is the intent of the Committee that the states still would be able to regulate the terms and conditions of these services. By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (e.g., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or other such matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

*3 H. Rep. No. 103-111, 103d Cong., 1st Sess. at 261, reprinted in 1993 U.S.Code Cong. & Admin.News at 588.

Under the rules of statutory construction, legislative history may be reviewed to resolve an ambiguity in a statute, but it may not be relied on to create an ambiguity which is not apparent on the face of a statute. Therefore, the question is whether the Preemption Clause is facially ambiguous as to the authority of the states to assess cellular providers for programs such as the Universal Service and Lifeline Programs.

While the DPUC claims an ambiguity exists in that portion of the Preemption Clause which states:

> ... this paragraph shall not prohibit a state from regulating the other terms and conditions of commercial mobile services ...

the court finds the following portion of the same subparagraph more to the point:

> Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a subsitute for land line telephone exchange service for a substantial portion of the communications within such state) from requirements imposed by a state commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.

The rules of statutory construction require that no language in a statute be read to be redundant. Because the former excerpt from the Preemption Clause grants to the states the authority to regulate "other terms and conditions" of cellular service, the latter excerpt, which expressly exempts from preemption any assessments for universal and affordable service where cellular service is a significant substitute for land line service, would be redundant if such assessments were among "other terms and conditions" of cellular service and thereby already exempt.

By expressly exempting from preemption those assessments which are made on cellular providers in a state in which cellular service is a substitute for land line service, Congress left no ambiguity that cellular providers in states in which cellular is not a substitute for land line service fall under the umbrella of federal preemption. Accordingly, it is held that the Budget Act preempts the DPUC from assessing Metro Mobile for payments to the Universal Service and Lifeline Programs.

ARTICLE SECOND STANDARDS FOR DELEGATION

Article Second of the Constitution of Connecticut, as amended by Article XVIII of its Amendments, provides:

> The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another. The legislative department may delegate regulatory authority to the executive department; except that any administrative regulation of any agency of the executive department may be disapproved by the general assembly or a committee thereof in such manner as shall by law be prescribed.

*4 The leading Connecticut case in which a delegation of authority by the legislature to the executive branch was voided for lack of sufficient standards is State v. Stoddard, 126 Conn. 623 (1940). In Stoddard, the court found that the challenged statute did not contain sufficiently definite standards for the exercise of the delegated authority, with the result that the executive branch was exercising an essentially legislative function in violation of Article Second. Stoddard dealt with a statute which authorized the state's milk administrator "to establish, from time to time, a minimum price for the different milk areas of the state for each class and grade of milk or milk products ..." The statute in issue contained only the following standard to guide the exercise of the delegated authority: "In establishing minimum prices for milk under the provisions of [the statute in issue], the milk administrator shall take into consideration the type of container used and other cost factors which should influence the determination of such prices." The court said that, in order to comply with the provisions of Article Second, a statute which delegates authority must establish "primary standards" for the exercise of that authority. Finding no such standards in the milk price act, the Court held it unconstitutional. Our courts have decided a number of cases sustaining legislative delegations to the executive branch, of which the following are examples:

Biz v. Liquor Control Commission, 133 Conn. 556 (1947), in which the court found sufficiently definite the standards in a statute which authorized the Liquor Control Commission to refuse to grant a liquor permit if the commission:

> has reasonable cause to believe ... that the number of permit premises in the locality is such that the granting of a permit is detrimental to public interest, and, in reaching a conclusion in this respect, the commission may consider the character of, the population of, the number of like permits and number of all permits existent in, the particular town and the immediate neighborhood concerned, the effect which a new permit may have on such town or neighborhood or on like permits existent in such town or neighborhood ...;

Id., 721; and,

Roan v. Conn. Industrial Building Comm., 150 Conn. 333 (1963), in which the court found sufficiently definite, for constitutional purposes, the standards governing the making of mortgage loans by a commission of the executive branch to private sector borrowers, which the court paraphrased as follows:

> The commission ... has ... to decide that the mortgage (1) is one made and held by an approved mortgagee, responsible and able to service the mortgage properly; (2) involves a principal obligation not in excess of $5,000,000 for any one project and not exceeding 90 percent of the cost of the project; (3) has a maturity within three-quarters of the remaining useful life of the property but not more than twenty-five years; (4) contains complete amortization provisions requiring periodic payments within the ability of the mortgagor to pay; and (5) contains essential provisions as to property insurance, repairs, taxes, default and similar matters.

Id., 344; and,

*5 University of Connecticut Chapter, AAUP v.

Governor, 200 Conn. 386 (1986), in which the court upheld a statute authorizing the governor to reduce budgetary allotments, in the court's words:

> if (1) due to a change in circumstances since the budget was adopted certain reductions should be made in various allotments of appropriations, or (2) the estimated budget resources during such fiscal year will be insufficient to pay all appropriations in full ...

Id., 398.

The Connecticut case which, on its facts, is closest to these appeals is Kellems v. Brown, 163 Conn. 478 (1972), which concerned a statute creating a tax on dividend income and authorizing the tax commissioner to adopt regulations for the operation and enforcement of that tax. The authority of the commissioner to adopt regulations was challenged on Article Second grounds, and the court noted that:

> The power granted to an administrative board or official may include, but is not limited to, the establishment of filing requirements, the hearing of administrative appeals, the finding of facts, and the determination of when as opposed to how a tax may be imposed.

Id., 499.

In Kellems the court went on to describe the separate legislative and administrative functions under the statute at issue, as follows:

> The General Assembly specifically levied the tax, the rate prescribed and defined the income subject to taxation as well as the persons who are required to pay. 12-505, 12-506. It then authorized the tax commissioner to (1) prescribe the information required of the taxpayer, (2) to design forms for returns, (3) to require the submission of copies of federal income tax returns and supporting records, (4) to extend time limitations, and (5) to promulgate regulations for enforcement of the act and collection of the prescribed tax.

Id., 500.

In holding the above-described statutory standards sufficiently definite, the Kellems court observed that:

> As long as revenue legislation sets out with specificity the rate of the tax, the instances where it is to be imposed and those who will be liable to pay it, there is no impermissible delegation of legislative power merely because the details of regulation and enforcement are left to administrative action.

Id., 501.

While Kellems concerned a tax statute, the analysis employed by the Kellems court is the same as that which appears in the other decisions cited above. Accordingly, the court concludes that Kellems is another in the line of well established Article Second delegation cases, and that Kellems is not a separate genre of tax case which deals, incidentally, with delegation issues. Therefore, it is not necessary for the court to decide whether, in a technical sense, assessments for the Universal Service and Lifeline Programs would constitute taxes in order to determine whether the Kellems analysis applies to these appeals.

The view that it does not matter, for Article Second purposes, whether payments made pursuant to P.A. 94-83 are denominated taxes or assessments is confirmed by an analysis of the elements of those types of imposition. Each involves a taking by government of money from a party in order to fund expenditures which have a presumed public purpose. (Since the constitutionality of the disbursement by the DPUC, outside of the legislative appropriation process, of monies raised by its assessments has not been raised in these appeals, and since a determination of the constitutionality of those disbursements is not necessary to a decision in these appeals, that issue is not addressed here.) In a constitutional sense, it makes no difference whether the authority for such a taking is characterized as a tax, an assessment or otherwise, because the consequence is the same; a lighter purse. One has a right to know that such a fiscal invasion is authorized by a constitutionally sufficient legislative directive. Accordingly, the standards laid out in Kellems apply to the delegation provisions of P.A. 94-83.

*6 The authority for the DPUC, under P.A. 94-83, to establish and fund the Universal Service Program is as follows: The [DPUC] may, if necessary, establish a universal service program, funded by all telecommunications companies or users in the state on an equitable basis, as determined by the [DPUC] ...

§ 16-247e(b), C.G.S.

The authority for the DPUC, under P.A. 94-83, to establish and fund the Lifeline Program is as follows:

> y(3)27 The [DPUC] shall ... establish a lifeline program funded by all telecommunications

companies on an equitable basis, as determined by the [DPUC] ...

§ 16-247c(a), C.G.S.

The narrow issue before the court is whether the language "on an equitable basis, as determined by the [DPUC]," as used in the legislative delegation of authority to the DPUC to fund the Universal Service and the Lifeline Programs, "sets out with specificity the rate of the [assessment], the instances where it is to be imposed and those who will be liable to pay it ...," as required by Kellems. Id., 501.

The determination of what is "equitable" is subjective, and therefore one person may find equitable what another finds distinctly inequitable. Because "equitable" is subject to many interpretations, it is the DPUC, in determining what is equitable, which "sets out with specificity the rate of the [assessment]," which determines "the instances where it is to be imposed" and which determines "those who will be liable to pay it." Because, according to Kellems, those determinations can only be made by the legislature, the grant of funding authority to the DPUC in P.A. 94-83 does not pass Kellems muster. Further, the single word "equitable" does not meet the criteria for primary standards developed by Stoddard, Biz and Roan. Accordingly, the funding mechanisms established by P.A. 94-83 violate Article Second.

The grant of authority to the DPUC, in P.A. 94-83, to establish the Universal Service Program "if necessary" raises a similar Article Second issue. However, that issue has not been raised by the parties, and its determination is not necessary to a decision in these appeals. Accordingly, that issue is not addressed here.

VOID FOR VAGUENESS DUE PROCESS STANDARDS

In State Mgmt. Assn. of Connecticut, Inc. v. O'Neill, 204 Conn. 746 (1987), a statute was challenged on due process vagueness grounds. The Court upheld the challenged statute and noted: Courts have derived the void for vagueness doctrine from the constitutional guarantee of due process. Civil statutes must be definite in their meaning and application, but may survive a vagueness challenge by a lesser degree of specificity than in criminal statutes. Due process of law requires that statutes must be sufficiently definite and precise to enable a person to know what conduct is permitted and what is prohibited. An imprecise statute, however, may be sufficiently definite if it provides reasonably distinct boundaries for its fair administration.

Id., 757-58. (Citations and quotation marks omitted.)

*7 In Bottone v. Westport, 209 Conn. 652 (1989), the court, after citing State Management Assn., refined the due process standard to be applied to void for vagueness challenges, as follows: Specifically, the standard is whether the statute afford[s] a person of ordinary intelligence a reasonable opportunity to know what is permitted or prohibited.

Id., 667. (Citations and quotation marks omitted.) Void for vagueness challenges on due process grounds are raised most frequently against criminal statutes, and therefore the test of whether a statute allows one to discern what is permitted or prohibited is framed for analysis of a criminal statute. However, the concept underpinning the standard, that is, whether a statute is drafted with the clarity or specificity needed to allow one to know to what it applies, can be applied as readily to challenges to legislative delegations as it can to legislative declarations of forbidden behavior.

Applying this due process test to P.A. 94-83, the question is whether the language "on an equitable basis, as determined by the [DPUC]" affords a person of ordinary intelligence a reasonable opportunity to know against whom assessments for the Universal Service and Lifeline Programs can be levied, and in what amounts. Those questions are answered in the negative, and it is held that the funding mechanisms for the Universal Service and Lifeline Programs contained in P.A. 94-83 are void for vagueness under the due process clause of the Connecticut Constitution, Article First, Section 8, as amended by Article XVII of its Amendments.

EFFECT OF THE 1996 ACT

As noted above, the 1996 Act provides: "A state may adopt regulations not inconsistent with the [FCC's] rules to preserve and advance universal service." As the parties stipulated at argument, the FCC has not yet adopted any such rules, and Connecticut has not adopted any such regulations. Accordingly, neither the 1996 Act, nor anything done by Connecticut pursuant to it, negates the Budget

Act's preemption of Connecticut's ability to assess Metro Mobile for the Universal Service and Lifeline Programs.

CONCLUSION

It is held that:

1) Substantial rights of Metro Mobile have been prejudiced by the DPUC decisions appealed from;

2) The DPUC's declared intent to assess Metro Mobile for the Universal Service and Lifeline Programs violates the Budget Act; and,

3) The funding mechanisms for the Universal Service and Lifeline Programs contained in P.A. 94-83, on which the decisions appealed from are based, violate Article Second and the due process clause of The Connecticut Constitution. These appeals are sustained.

END OF DOCUMENT

KUSF SUPPORT PAYMENTS

Q. Who should receive support?

A. Per the recommendation in the USWG report, companies that provide service in high cost rural areas should receive support. Rural areas are defined as exchanges which have 10,000 or fewer access lines. The "High Cost" classification for an exchange(s) is declared when the incumbent LEC is a KUSF recipient. The Kansas Act provides KUSF distributions for companies "that are deemed eligible both under subsection(e)(1) of section 214 of the federal act and by the Commission." (Sec.9(c)) That could include Alternative LECs (ALECs) and make them eligible for KUSF to the extent that they provide service in the high cost rural area.

Q. Should wireless providers be included in the eligibility for KUSF support payments?

A. Wireless providers have made no showing that wireless service is indeed an equivalent substitution for wireline service. While the Kansas Act certainly leaves the door open for the wireless industry to receive support, there are a number of concerns which Staff should mention. The current problem of rebalancing access rates is tied to the support for wireline service and is not caused by wireless service. The problem is one that is tied to the regulated telecommunications industry. As a result payments should be directed initially to continue the support for universal service. Wireless companies will benefit because they will receive or have already received (through contract arrangements) reductions in the access charges they pay to complete calls terminating outside the local exchange. The Commission must continue to be attuned to the changes in technology and customer preferences which could shift away from wireline. Kansas certainly does not want to support a technology beyond its usefulness. Imagine if we all had telegraph

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testimony, you address the issue of substitutability of wireless service or wire line service, do you see that?

A. Yes, sir.

Q. Okay. Do I read this as stating in Staff's opinion, wireless service is not a substitute for wire line service?

A. What I was pointing out here is that the industry had not made a case that it was, and at this point in time we are certainly not aware that it is.

Q. Okay. And that includes both cellular and PCS?

A. Yes.

Q. Right? If you go down a little farther on that page, Line 17 through 19, where you testified the current problem of rebalancing access rates is tied to the support for wire line service and is not caused by wireless service. Do you see that testimony?

A. Right.

Q. So is it, is it your belief that the wireless providers are not to blame for any of the problems that are -- that, that the Staff and other companies are attempting to solve through

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MOUNTAIN SOLUTIONS, INC., et al., Plaintiffs, v. THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, et al., Defendants.	)	Case No. 97-2116-KHV

PLAINTIFFS'[1] REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR APPLICATION FOR PRELIMINARY INJUNCTION

Defendants' memorandum in opposition to plaintiffs' request for injunctive relief collapses under its own lack of logic. The plain language of 47 U.S.C. § 332(c)(3) preempts the state from imposing "requirements . . . necessary to ensure universal availability of telecommunications service at affordable rates" on commercial mobile services providers. In an effort to avoid this preemption, defendants resort to arguing that the *mandatory* contributions to the Kansas Universal Service Fund ("KUSF") the state has imposed on plaintiffs are not "requirements." This silly argument, like defendants' argument that this Court should ignore Section 332(c)(3) altogether, merely underscores the likelihood that plaintiffs will prevail on the merits of their preemption claim.

Defendants also assert that plaintiffs will suffer no irreparable harm if the KUSF assessment is not enjoined, while at the same time admitting that the plaintiffs stand to lose customers from the imbalance in the marketplace the assessment will cause. Finally, while

[1] The term "plaintiffs" refers to plaintiffs Mountain Solutions, Inc., Sprint Spectrum, L.P., Liberty Cellular, Inc., Mercury Cellular of Kansas, Inc., Western Wireless Corporation, DCC PCS, Inc., and Dobson Cellular of Kansas/Missouri, Inc.

admitting that the KUSF will be fully funded even if the injunction is granted, the defendants claim that an unspecified "delay" in implementing the KUSF could result from an injunction. Any such "delay," however, pales in contrast to the interest of the public in ensuring that its public officials carry out their duties legally and in conformity with the Constitution. In short, all factors favor the granting of plaintiffs' application for injunctive relief.

I.

ARGUMENT

A. PLAINTIFFS HAVE DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIM THAT 47 U.S.C. § 332(C)(3) PREEMPTS K.S.A. 66-2008(B) AND THE KCC REGULATIONS PROMULGATED THEREUNDER

The central issue here is a purely *legal* question for this Court: Does 47 U.S.C. § 332(c)(3) ("Section 332"), which specifically exempts CMS providers, whose service is not a substitute for land line telephone exchange service, from state-imposed universal service "requirements," preempt defendants' attempt to force plaintiffs to contribute to the KUSF?[2] Remarkably, defendants argue that compulsory KUSF contributions mandated by the State legislature and implemented by a State commission are not "requirements imposed by a State commission [relating to universal service]" within the meaning of Section 332(c)(3). As set forth

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2 Defendants mistakenly rely on Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399 (1941), Pennsylvania v. Nelson, 350 U.S. 497, 76 S.Ct. 477 (1956) and New York State Dep't of Social Services v. Dublino, 413 U.S. 405, 93 S.Ct. 2507 (1973), as setting forth the appropriate standards for this Court to follow in considering Plaintiffs' preemption claim. (See Def. Opp. at 4-5.) These cases, however, apply only in situations where Congress has impliedly "occupied the field," thus precluding state legislation in that field. By contrast, this case concerns *express* preemption of specific state action by a federal statute. As a result, the issue before this Court is whether, pursuant to the familiar rules of statutory construction, the statutory preemption applies. See, e.g., Grunbeck v. Dime Savings Bank of New York, 74 F.3d 331, 336 (1st Cir. 1996) (citing CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664, 113 S.Ct. 1732, 1737, 123 L.Ed.2d 387 (1993)). Moreover, contrary to the defendants' contention, *no* presumption of validity attaches to the state legislation and regulations at issue in this *express* preemption situation.

below, defendants' arguments are not only illogical in the extreme, but fly in the face of well-established principles of statutory construction.

1. Defendants Cannot Pick And Choose Which Statutes To Follow.

The clear and unambiguous language of Section 332(c)(3) bears repeating:

> (3) State preemption
>
> (A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. *Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.* Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if the State demonstrates that . . . .

47 U.S.C. § 332(c)(3) (emphasis added).

Defendants' entire argument rests on the faulty — and odd — premise that the "contributions" to universal service funds, which Section 254(f) of the Telecommunications Act of 1996 authorizes States to require from all telecommunications carriers, are somehow not also "requirements" within the meaning of the above-quoted language. Section 332(c)(3) "requirements," say defendants, refer solely to non-monetary requirements, and thus do not include universal fund contributions authorized by Section 254(f), *even though such a limitation appears nowhere in the Code*. Absurd.

The proffered basis for defendants' interpretation is Congress' use of the term "States" in Section 254(f) compared to its use of the term "State commissions" in Section 332(c)(3). (Def. Opp. at 8-9.) Defendants' own brief establishes that this is a distinction without a difference. According to defendants, the Kansas Corporations Commission is in charge of the "momentous responsibility" of implementing the Kansas legislature's statute establishing the KUSF. (Def. Opp. at 2, 12.) Obviously, the "state commission" cannot act without authority from the "state." Moreover, even if it were theoretically possible for a "state" to act in the telecommunications field without relying on a "state commission" for implementation, *that is not the situation before the Court*. Here, the actions of a "state commission" are directly in issue. Defendants are arguing an irrelevancy.

Moreover, as a matter of simple statutory interpretation and dictionary meaning, defendants' argument makes no sense. Words in a statute, unless otherwise defined, are to be given their ordinary, generally-accepted meanings. Atchison, Topeka and Santa Fe Ry. Co. v. U.S., 628 F.Supp. 1431, 1437 (D.Kan. 1986) (citing Caminetti v. United States, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed.2d 442 (1917)). A "requirement" is "that which is required; a thing demanded or obligatory" or "some quality or performance demanded of a person in accordance with certain fixed regulations." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (Unabridged 2d ed., 1987). Applying this generally-accepted meaning, the Kansas legislature's and KCC's mandate that CMS providers contribute to the KUSF is a "requirement" within the scope of Section 332(c)(3). To argue that a requirement to contribute to a universal service fund (pursuant to Section 254(f)) somehow is not a "requirement . . . necessary to ensure the universal availability of telecommunications service" (pursuant to Section 332(c)(3)) is ridiculous.

According to defendants, only by reading "requirements" as used in Section 332(c)(3) to the exclusion of "contribut[ion]" as used in Section 254(f) can those sections be harmonized. Defendants are simply wrong. First, Section 332(c) is specific in application to "commercial mobile services." As such, it controls over any potentially conflicting provisions of Section 254(f), which are general. See Gozlon-Peretz v. United States, 498 U.S. 395, 111 S.Ct. 840, 848, 112 L.Ed.2d 919 (1991). Second, read together as they must be, the statutes provide that states can require CMS providers to contribute to universal service funds in accordance with Section 254 as long as the requirements of Section 332(c) are met; namely, that there is a finding that commercial mobile services are a substitute for land line telephone exchange services for a substantial portion of communications within a given state. Negonsott v. Samuels, 933 F.2d 818, 819 (10th Cir. 1991) (statutes must be read together to the extent possible). In this case, no such finding was made. If Congress had wanted to change Section 332(c) when it passed the 1996 Telecommunications Act, it would have done so.

Nothing in Section 254(f) or the Telecommunications Act of 1996 modifies, much less repeals, Section 332(c). In fact, the interrelationship among the telecommunications statutes proves Congress intended, through Section 332(c), to treat plaintiffs and other CMS providers differently from other telecommunications providers. Section 332(c)(3) was already the law when Congress passed the Telecommunications Act of 1996, including Sections 253 and 254.[3] Section 253 is entitled "Removal of barriers to entry." Subsection (b) of that statute provides in relevant part that "[n]othing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service . . . ." Subsection (e), entitled

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[3] Section 332(c)(3) was enacted in 1993 as part of the Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66 § 6002, 107 Stat. 394 (1993).

"Commercial mobile service providers," then expressly recognizes the continued vitality of Section 332(c)(3):

> Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

47 U.S.C. § 253(e). This explicit reference in Section 253 to Section 254, subject to the limitation of Section 253(e) — and, by explicit extension, Section 332(c)(3) — conclusively establishes that Congress intended to continue to preclude the States from forcing CMS providers to contribute to universal service funds. Any other interpretation would require that Section 332(c)(3) be read out of the statute books, an untenable result. St. Louis, I. M. & S. Ry Co. v. U.S., 251 U.S. 198, 207, 40 S.Ct. 120, 122 (1920); U.S. v. Trident Seafoods Corp., 92 F.3d 855, 862 (9th Cir. 1996).

Finally, Congress' purpose in preempting States from regulating CMS providers in the context of universal service regulation was to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications industry." House Rep. No. 103-111, 103d Cong., 1st Sess. at 261, reprinted in 1993 U.S.C.C.A.N. at 587. Congress clearly intended to continue this protection of CMS providers when it enacted the Telecommunications Act of 1996, as evidenced by its inclusion of Section 253(e), which explicitly preserves the preemptive effect of Section 332(c)(3). The wisdom of Congress' action is not at issue here, and it is beyond the power of the Kansas legislature and the KCC to thwart the will of Congress. Defendants' tortured interpretation of federal law must be rejected, and plaintiffs' injunction should be granted to prevent defendants from illegally imposing KUSF funding obligations on plaintiffs.

3. THE OPINION OF AN ADMINISTRATIVE BODY ON THE EFFECT OF SECTION 332(C)(3) IS ENTITLED TO NO DEFERENCE BY THIS COURT.

Defendants rely on a report by a Joint Board of State and Federal Communications Commission ("FCC") commissioners for the proposition that Section 332(c)(3) does not apply here. In that report, the Joint Board opined that State-mandated universal service fund contributions imposed on CMS providers under Section 254(f) are not preempted by Section 332(c)(3). (Def. Opp. at 7, n.13.) The Joint Board's opinion, however, is entitled to absolutely no deference in this Court because it directly conflicts with both the plain language of the statutes and the intent of Congress.[4]

The construction of statutes always presents a question of law, and this Court must reject an agency interpretation that conflicts with Congressional intent. Grunbeck v. Dime Savings Bank of New York, 74 F.3d 331, 336 (1st Cir. 1996) (citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984)). Where Congress has spoken directly on an issue, an interpretation rendered by an agency is entitled to no special deference. Id. Because Congress explicitly provides, on the plain language of the statutes, that Section 332(c)(3) preempts attempts by states to require contributions to USFs by CMS providers, and this result is consistent with the expressed purpose of Congress, this Court must reject and decline to follow the opinion of the Joint Board to the contrary.

In short, defendants' attempts to torture the federal statutes into saying what Congress never said, and into supporting an outcome which Congress did not endorse, must fail. The

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[4] The Joint Board's purpose was solely to "recommend changes to any of the [FCC's] *regulations*" in order to implement universal service. 47 U.S.C. § 254(a)(1) (emphasis added). The Joint Board has no authority to opine on the intent of Congress to preempt State regulation of CMS providers under Section 332(c)(3).

plain language of the telecommunications laws establishes that states may not require CMS providers to contribute to universal service funds. Accordingly, plaintiffs' application for preliminary injunctive relief must be granted.

B. PLAINTIFFS WILL SUFFER IRREPARABLE HARM UNLESS A PRELIMINARY INJUNCTION ISSUES.

Defendants cavalierly suggest that plaintiffs will suffer no irreparable harm if forced to contribute — illegally, in plaintiff's view — to the KUSF because (1) plaintiffs will somehow be able to get their contributions back if they prevail at a later date; (2) the decrease in "net income" to those plaintiffs who choose not to pass on the assessment is not "irreparable;" and (3) the decrease in subscribers that will, admittedly, result to those who do pass it on will not be the fault of the state, but rather of the "competitive marketplace." (Def. Opp. at 11.)[5] To be charitable, defendants' claims are naive in the extreme.

If injunctive relief is denied and plaintiffs are required to proceed to trial at a later time, it is now clear that the money contributed by them to the KUSF in the meantime will be irretrievably lost. This is because the sums contributed to the KUSF are slated for payout to those land line providers who experience a decrease in revenue due to the implementation of the KUSF program. See December 27 Order of the Kansas Corporation Commission, ¶ 106. Plaintiffs would have no means at law or in equity to recover those monies paid out to other companies under the "revenue neutrality" scheme devised by the KCC to benefit the land line providers.

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[5] Defendants also assert that the KUSF will somehow benefit plaintiffs by increasing their subscriber base. (Def. Opp. at 6.) If anything, the KUSF will increase the base of *land line* providers, not wireless providers.

Perhaps unwittingly, defendants *admit* that plaintiffs will suffer irreparable harm if forced to contribute to the KUSF:

> [E]very telecommunications carrier engaged in the provision of intrastate telephone service in Kansas must contribute to the KUSF. Thus, no matter where a customer turns he or she will be faced with paying for the KUSF assessment, unless a company decides not to pass on the cost of the KUSF assessment to its customers. However, in that instance, it would be a superior competitor *which steals Plaintiffs' customers;* a circumstance which is not irreparable harm caused by the state legislation, but rather arising from the realities of a competitive marketplace.

(Def. Opp. at 11 (emphasis added).) The question in this prong of the injunctive relief inquiry is whether plaintiffs will suffer "irreparable harm" if the assertedly unlawful conduct is not enjoined. Here, defendants concede the potential harm to plaintiffs in the language quoted above. These "stolen" customers are essentially gone for good, and defendants' blame-shifting argument is outrageous. Defendants cannot honestly contend that artificial "realities" compelled by an unlawful KUSF assessment are merely the result of a "competitive marketplace."[6]

Indeed, in the marketplace consists of customers who, as a whole, are sensitive to price increases. If all plaintiffs and CMS providers pass KUSF changes to their customers, basic economics dictate that the demand for CMS will decline. There will be fewer customers, and those customers who remain will use fewer commercial mobile services. The pie will decrease, as it were, and with it the size of each piece. For this loss, which results directly from the unlawful KUSF obligation, plaintiffs have no place to turn to be made whole.

Moreover, in order to implement the KUSF funding requirement in the first instance, plaintiffs will be forced to completely reorganize their billing procedures. These costs will be

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6 Furthermore, to the extent the defendants suggest that the plaintiffs should somehow agree among themselves not to pass the KUSF assessment on to their customers, defendants are endorsing an antitrust violation. <u>See</u> 15 U.S.C. § 1.

unrecoverable. Finally, many of the plaintiffs are entities who, if forced to contribute to the KUSF and if they elect not to pass on the cost, risk serious, permanent and noncompensable harm to their businesses. Plaintiff has met its burden to establish "irreparable harm."[7]

C. THE PUBLIC INTEREST IN THE LAWFUL ADMINISTRATION OF THE KUSF OUTWEIGHS ANY POTENTIAL "DELAY" IN ITS IMPLEMENTATION WHICH COULD RESULT FROM AN INJUNCTION.

Defendants discuss at length the public interest that is being furthered by the KUSF. (Def. Opp. at 12-13.) A preliminary injunction, however, will not harm this interest. As defendants admit, the KUSF will continue to exist, and will be fully funded, although without the contributions of CMS providers. (Def. Opp. at 7.) Because an injunction will not dismantle the KUSF, defendants' discussion of the genuine public interest in the KUSF is beside the point. The only legitimate question is whether the practical effect of an injunction implicates a public interest which outweighs plaintiffs' and the public's interest in seeing that the defendants abide by the Constitution and laws of the United States. The balance tips decidedly in plaintiffs' favor.

The only potential impact of an injunction identified by defendants is a potential delay in the implementation of the KUSF. (Def. Opp. at 13 ("the damage is in the delay of implementing this program").) Against the potential for "delay" — the practical impact of which defendants never explain — the citizens of Kansas have an important and recognized interest in seeing that their public officials abide by the law. Woodall v. Bartolino, 700 F.Supp. 210, 221 (D.N.J. 1988) (it is in the public interest to enjoin the actions of public officials when those actions are not in compliance with the law). Defendants' argument boils down to an assertion

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[7] Plaintiffs will present testimony to this Court at its hearing on March 26, 1997 in support of this prong of the inquiry.

that the ultimate ends (universal telephone service, which is not impacted by this action) justify the means (illegal contribution assessments against CMS providers). This Court should reject defendants' untenable approach and grant plaintiffs' application for injunctive relief.

II.

CONCLUSION

For the reasons stated herein, Plaintiffs request that the Court grant a preliminary injunction prohibiting Defendants from requiring them to contribute to the KUSF, and for such other and further relief the Court deems just and proper.

Respectfully submitted,

SONNENSCHEIN NATH & ROSENTHAL

Mark P. Johnson
Jan P. Helder, Jr. KS #14440
Tamara Seyler-James
David S. Ladwig KS #15947
Lisa C. Creighton KS #14847
Amy E. Bauman
4520 Main Street, Suite 1100
Kansas City, Missouri 64111
Telephone: (816) 932-4400
Facsimile: (816) 531-7545

ATTORNEYS FOR PLAINTIFFS MOUNTAIN SOLUTIONS, INC., SPRINT SPECTRUM, L.P., LIBERTY CELLULAR, INC., MERCURY CELLULAR OF KANSAS, INC., WESTERN WIRELESS CORPORATION, DCC PCS, INC., and DOBSON CELLULAR OF KANSAS/MISSOURI, INC.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was sent via facsimile and U.S. Mail, postage prepaid, this 24th day of March, 1997, to:

Michael D. Moeller, Esq.
Shook, Hardy & Bacon L.L.P.
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105

and

William R. Drexel, Esq.
Michael C. Cavell, Esq.
Southwestern Bell Telephone Company
Legal Department
220 E. Sixth Street, Room 515
Topeka, KS 66603

ATTORNEYS FOR SOUTHWESTERN BELL TELEPHONE COMPANY

Mr. Christopher Burger
Assistant Attorney General
Ms. Carla Stovall
Attorney General of the State of Kansas
Office of the Attorney General
Second Floor, Judicial Center
301 S.W. 10th
Topeka, KS 66612

ATTORNEY FOR ATTORNEY GENERAL OF THE STATE OF KANSAS

James M. Caplinger, Jr.
James M. Caplinger, Chartered
823 W. 10th
Topeka, Kansas 66612-1618

ATTORNEY FOR INDEPENDENT LOCAL EXCHANGE CARRIERS

Ms. Eva Powers
The State Corporation Commission
of the State of Kansas
1500 S.W. Arrowhead Road
Topeka, KS 66604-4027

ATTORNEY FOR THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS

National Exchange Carrier Association, Inc.
c/o The Corporation Company, Inc.
515 S. Kansas Avenue
Topeka, KS 66603

Marc E. Elkins
Morrison & Hecker L.L.P.
2600 Grand Avenue
Kansas City, Missouri 64108

ATTORNEY FOR PLAINTIFFS AIRTOUCH CELLULAR OF KANSAS, INC., TOPEKA CELLULAR TELEPHONE COMPANY, INC. and CMT PARTNERS

ATTORNEY FOR PLAINTIFFS

9032578

KUSF SUPPORT PAYMENTS

Q. Who should receive support?

A. Per the recommendation in the USWG report, companies that provide service in high cost rural areas should receive support. Rural areas are defined as exchanges which have 10,000 or fewer access lines. The "High Cost" classification for an exchange(s) is declared when the incumbent LEC is a KUSF recipient. The Kansas Act provides KUSF distributions for companies "that are deemed eligible both under subsection(e)(1) of section 214 of the federal act and by the Commission." (Sec.9(c)) That could include Alternative LECs (ALECs) and make them eligible for KUSF to the extent that they provide service in the high cost rural area.

Q. Should wireless providers be included in the eligibility for KUSF support payments?

A. Wireless providers have made no showing that wireless service is indeed an equivalent substitution for wireline service. While the Kansas Act certainly leaves the door open for the wireless industry to receive support, there are a number of concerns which Staff should mention. The current problem of rebalancing access rates is tied to the support for wireline service and is not caused by wireless service. The problem is one that is tied to the regulated telecommunications industry. As a result payments should be directed initially to continue the support for universal service. Wireless companies will benefit because they will receive or have already received (through contract arrangements) reductions in the access charges they pay to complete calls terminating outside the local exchange. The Commission must continue to be attuned to the changes in technology and customer preferences which could shift away from wireline. Kansas certainly does not want to support a technology beyond its usefulness. Imagine if we all had telegraph testimony, you address the issue of substitutability of wireless service or wire line service, do you see that?

A. Yes, sir.

Q. Okay. Do I read this as stating in Staff's opinion, wireless service is not a substitute for wire line service?

A. What I was pointing out here is that the industry had not made a case that it was, and at this point in time we are certainly not aware that it is.

Q. Okay. And that includes both cellular and PCS?

A. Yes.

Q. Right? If you go down a little farther on that page, Line 17 through 19, where you testified the current problem of rebalancing access rates is tied to the support for wire line service and is not caused by wireless service. Do you see that testimony?

A. Right.

Q. So is it, is it your belief that the wireless providers are not to blame for any of the problems that are -- that, that the Staff and other companies are attempting to solve through

Federal Communications Commission (F.C.C.)

First Report and Order

IN THE MATTER OF IMPLEMENTATION OF THE LOCAL COMPETITION PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996
CC Docket No. 96-98

Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers
CC Docket No. 95-185

FCC 96-325
Adopted: August 1, 1996
Released: August 8, 1996

By the Commission: Chairman Hundt and Commissioners Quello, Ness, and Chong issuing separate statements.

the language in section 332(c)(1), stating that "this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection" expressly limits the Commission's authority to respond to a CMRS provider's request for interconnection and thus does not give the Commission jurisdiction over LEC-CMRS interconnection rates. [FN2425] BellSoutl further argues that subjecting CMRS providers' charges for termination of LEC-originated calls to federal preemption would be inconsistent with Congress's determination in the 1996 Act that the terms and conditions of interconnection are to be decided by negotiation among LECs and telecommunications carriers, subject to the state review process. [FN2426]

3. Discussion

1022. Several parties in this proceeding argue that sections 251 and 252 provide the exclusive jurisdictional basis for regulation of LEC-CMRS interconnection rates. [FN2427] Other parties assert that sections 332 and 20 provide the exclusive jurisdictional basis for regulation of LEC-CMRS interconnection rates. [FN2428] Some parties have argued that jurisdiction resides concurrently under sections 251 and 252, on the one hand, and under sections 332 and 201 on the other. [FN2429]

1023. Sections 251, 252, 332 and 201 are designed to achieve the common goal

of establishing interconnection and ensuring interconnection on terms and conditions that are just, reasonable, and fair. It is consistent with the brc authority of these provisions to hold that we may apply sections 251 and 252 t

LEC-CMRS interconnection. By opting to proceed under sections 251 and 252, we are not finding that section 332 jurisdiction over interconnection has been repealed by implication, or rejecting it as an alternative basis for jurisdiction. We acknowledge that section 332 in tandem with section 201 is a basis for jurisdiction over LEC-CMRS interconnection; we simply decline to define the precise extent of that jurisdiction at this time.

1024. As a practical matter, sections 251 and 252 create a time-limited negotiation and arbitration process to ensure that interconnection agreements will be reached between incumbent LECs and telecommunications carriers, including CMRS providers. We expect that our establishment of pricing methodologies and default proxies which may be used as interim rates will help expedite the parties' negotiations and drive voluntary CMRS-LEC interconnection agreements. We also believe that sections 251 and 252 will foster regulatory parity in that these provisions establish a uniform regulatory scheme governing interconnection between incumbent LECs and all requesting carriers, including CMRS providers. Thus, we believe that sections 251 and 252 will facilitate consistent resolution of interconnection issues for CMRS providers and other carriers requesting interconnection.

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1025. Although we are applying sections 251 and 252 to LEC-CMRS interconnection at this time, we preserve the option to revisit this determination in the future. We note that Section 332 generally precludes states from rate and entry regulation of CMRS providers, and thus, differentiates CMRS providers from other carriers. [FN2430] We also recognize that, based on the combined record in CC Docket No. 95-185 and CC Docket No. 96-68, there have been instances in which state commissions have treated CMRS providers in a discriminatory manner with respect to the terms and conditions of interconnection. [FN2431] Should the Commission determine that the regulatory scheme established by sections 251 and 252 does not sufficiently address the problems encountered by CMRS providers in obtaining interconnection on terms an conditions that are just, reasonable and nondiscriminatory, the Commission may revisit its determination not to invoke jurisdiction under section 332 to regulate LEC-CMRS interconnection rates.

1026. Our decision to proceed under section 251 as a basis for regulating LEC CMRS interconnection rates should not be interpreted as undercutting our intent to enforce Section 332(c)(3), for example, where state regulation of interconnection rates might constitute regulation of CMRS entry. In such situations, state action might be precluded by either section 332 or section 253. Such circumstances would require a case-by-case evaluation. We note, however, that we are aware of numerous specific state requirements that may

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constitute CMRS entry or rate regulation preempted by section 332. For exampl many states, such as California, require all telecommunications providers to certify that the public convenience and necessity will be served as a precondition to construction and operation of telecommunications services with the state. [FN2432] Some states, such as Alaska and Connecticut, also require CMRS providers to certify as service providers other than CMRS in order to obtain the same treatment afforded other telecommunications providers under state law. [FN2433] Hawaii and Louisiana, in addition to imposing a certification requirement, require CMRS providers and other telecommunications carriers to file tariffs with the state commission. [FN2434] We will not permit entry regulation through the exercise of states' sections 251/252 authority or otherwise. In this regard, we note that states may not impose on CMRS carriers rate and entry regulation as a pre-condition to participation in interconnection agreements that may be negotiated and arbitrated pursuant to sections 251 and 252. We further note that the Commission is reviewing filings made pursuant to section 253 alleging that particular states or local governments have requirements that constitute entry barriers, in violation of section 253. We will continue to review any allegations on an ongoing basis, including any claims that states or local governments are regulating entry or imposing requirements on CMRS providers that constitute barriers to market entry.